SUPREME COURT, U. S.

JUL 31 1969

JOHN F. DAVIS, CLERK

No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1969

CARLTON DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Carlton Draper, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on June 17, 1969.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion here presented for review has not yet been reported. It is set forth as Appendix A.

JURISDICTIONAL STATEMENT

The opinion whose review is sought herein was entered and dated June 17, 1969.

On July 17, 1969, Mr. Justice Marshall extended the time for filing the Petition for Writ of Certiorari herein until July 31, 1969.

The jurisdiction of this court is invoked under provisions of Section 1254(1), Title 28, United States Code.

QUESTION PRESENTED FOR REVIEW

When a defendant in a narcotic prosecution testifies that the government informant to whom he transferred a quantity of narcotics placed that same quantity of narcotics in the defendant's possession to the end that it be redelivered under circumstances incriminatory of the defendant, does the government sustain its burden of proof where it fails to rebut the defendant's testimony, or may the government rely upon the possibility that the jury will simply disbelieve a defendant whose defense will necessarily concede that he engaged in the very transaction charged in the indictment?

STATEMENT OF THE CASE

Petitioner was charged with having engaged in a transaction involving the transfer of a quantity of heroin on June 16, 1967, in violation of Section 174, Title 21, United States Code.

The government's evidence disclosed that Federal Narcotic Agent Jordan monitored two telephone calls made by the government informant Hernandez to the defendant's house. In the first call, the agent testified that

Hernandez told the defendant that he had a buyer for the heroin, to which the defendant replied that he did not want to meet anyone and that if the sale went down, the informant was to come alone. The defendant added that he had two ounces and that the price would be $1200 (Tr. 15-19).

On the following day, Agent Jordan again monitored the informant's call. The informant said everything was ready. The defendant reiterated that he had about two ounces and that the price was $1200. A rendezvous was arranged (Tr. 20-21). On the informant's arrival at the rendezvous, the defendant entered the informant's car with defense witness Sheain (Tr. 22-24). He was arrested almost immediately by the observing agents who, upon reaching the informant's car, saw the defendant with a number of foil packets, one of which he held open (Tr. 25-26).

Agent Jordan testified that the informant Hernandez had been subpoenaed by the government a few days before trial but that the government had been unable to locate him since then (Tr. 34-35).

On cross-examination, the agent testified that Hernandez became a government informant sometime in April, 1967, following his own apprehension as a narcotic violator (Tr. 115). His first co-operation with the government resulted in the arrest of petitioner (Tr. 173). The agent testified that the informant, acting in the agent's behalf, was to perform police functions, as to which the agent gave him no instruction (Tr. 122-123).

The defendant admitted the telephone conversations with the informant, but denied the words "heroin" and "1200" were used (Tr. 316). He testified that some two or three weeks before his arrest, the informant had placed the drugs in his possession for safekeeping (Tr. 277-278) and that in returning them to the informant, he had thrown the package on the seat (Tr. 288). According to the defendant, the informant opened the package, looked at the contents, and made no reply when asked by the defendant why he was looking at the contents (Tr. 289).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In the Court of Appeals petitioner urged that where evidence was introduced that the narcotic subject matter of the offense alleged was itself placed in his hands by the government informant, entrapment as a matter of law was established, so that the burden fell upon the government to introduce evidence which would tend to rebut the defendant's testimony.

Here, the defendant testified that the narcotics he transferred to the informant were narcotics which the informant had himself placed in the defendant's hands a short time before the transaction with which the defendant was charged. Presumably, the informant would thus square his own account with the government upon the charges which he faced.

In *Sherman* v. *United States*, 356 U.S. 369, this Court found entrapment as a matter of law, where the persistence of the entrapping informer finally wore through the truly marginal resistance of a previous narcotic offender. Although the reversing majority permitted its opinion to balance on the proposition that the defendant's "ready complaisance" had been insufficiently established by the government in rebuttal, the reversing majority reserved its actual horror for the acts of the government agent who procured Sherman's violation.

A concurring minority (four judges) would have arrived at an identical result via a different route. The minority would have set aside the conviction ". . . not because [Sherman's] conduct falls outside the proscription of the

statute, but because even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction cannot be countenanced." (*Sherman*, 380).

In *Accardi* v. *United States*, 257 F.2d 169, 172, 173 (5 Cir., 1958), the court observed that the majority in Sherman had reaffirmed its emphasis on the defendant's prior intentions or his readiness to commit an offense, but felt called upon to note ". . . the court by no means downgrades the duty of scrutinizing closely the conduct of the government agents." In *Accardi* (n., page 173) the court observed that the majority in *Sherman* attached almost as much importance as the minority to the "*conduct of the government agents*", (emphasis, the court's) saying "there is scarcely a decibel's difference in their expressions of shock and outrage in the agent's methods."

Whatever rationale is employed by the courts, the net result seems to be that if the conduct of a government agent is sufficiently shocking, one never really gets to the question as to whether or not the defendant had a predisposition to commit the offense. Thus, where the agent engages in conduct which shocks the conscience of the court, and *where there is no rebuttal of the evidence which establishes that conduct*, the fact that the defendant is disclosed to have had a predisposition to violate the law does not effect the result, and entrapment as a matter of law follows:

In *Waker* v. *United States*, 344 F.2d 795-796 (1 Cir., 1966), the court stated in relevant part ". . . where the inducement was not shocking or offensive *per se*, the only issue is whether the defendant was sufficiently predisposed, so that while the particular offense was brought about by the government agent, the defendant's criminality or 'corruption' was not." Inferentially, if the induce-

ment was shocking or offensive *per se,* that provides a separate issue, as to which the government has a positive burden of proof.

Whiting v. *United States,* 321 F.2d 72, 75-6 (1 Cir., 1963) focuses the question more precisely, in terms of allocating law questions and fact questions, and in distributing the burdens of proof.

Whiting holds that in analyzing entrapment cases the court must first decide whether or not there was an entrapment as a matter of law. And once it is shown that a government agent induced a sale of narcotics then, "the government should establish that it engaged in no conduct that was shocking or offensive per se, *and* that the defendant was not, in fact, corrupted by the government" (*Whiting,* 76, emphasis supplied).

In *Accardi* v. *United States,* 257 F.2d 169 (5 Cir., 1958), the court discussed at length the evident readiness of the defendant to join a narcotic conspiracy. Turning to the matter of the agent's inducement and observing that the inducement consisted in no more than a simple solicitation to the defendant, the court remarked (page 173) "On such evidence as is undisputed, the agents' conduct does not shock the conscience of this court. There was no entrapment as a matter of law" (i.e., where what is questioned is entrapment "as a matter of law," we analyze the *agent's* acts, not the defendant's).

In its opinion, the court below simply took the view that the defendant's version of the transaction was one which the jury was free to disbelieve, embracing the account of the government agents while rejecting the defendant's.

We suggest that the evidentiary configuration envisaged by the opinion is fundamentally unfair. The government is enabled thereby to employ the services of in-

formants who have every motive to injure others, offending or not. Informants who not only are motivated to do injury, but whose moral refinement exerts no inhibition upon them to refrain from injuring the unoffending.

The balance struck by the Court of Appeals between the testimony of the kinds of persons likely to appear as defendants and the testimony of badge-wearing agents of the United States is specious. Juries will *always* reject the testimony of the defendant in such matters whose defense requires admission of the offense, placing their reliance in the readily apparent moral superiority of the agents. Kept from the jury's view is the only government agent who has any importance whatever to the case—the informant. Thus the government is enabled to create the impression that its entire cast is decent and objective, while in point of fact, production of the informant before the jury would require the jury to adjudge something other than a popularity contest in which one side always enjoys a commanding, though undeserved, advantage.

We respectfully submit that where the testimony of the defendant establishes conduct of the government by its informant agent which is offensive *per se* the government is not entitled to rely upon a contest which pits the apparent veracity of the official government agent against that of the less than prepossessing defendant.

CONCLUSION

For the foregoing reasons we respectfully urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

FRANK W. OLIVER
Attorney for Petitioner

APPENDIX

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968, APRIL SESSION, 1969

No. 17012
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
CARLTON C. DRAPER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 17, 1969

Before MAJOR, *Senior Circuit Judge*, and KILEY and SWYGERT, *Circuit Judges*.

MAJOR, *Senior Circuit Judge*. Defendant Draper was charged by indictment with receiving, concealing, buying and selling heroin, in violation of Title 21 U.S.C.A. Sec. 174. His first conviction, following a jury trial, was vacated on the premise that the jury had been improperly instructed. The case was retried, again by a jury which, on March 28, 1968, returned a verdict finding him guilty. From a judgment entered thereon defendant appeals.

The case is here solely on the basis that the court erred in its refusal to allow defendant's motion for judgment of acquittal made at the close of the evidence. The motion stated "that the defendant had shown a prima facie case of entrapment and that the government failed to carry its burden at that stage of showing that the defendant was not induced to commit the offense, or if he was induced to commit it that he had a previous disposition to commit it, had adduced no evidence to negate the defendant's contention that the heroin was originally placed in his hands by the informant, and had otherwise failed to prove a prima facie case."

Defendant's counsel, evidently in an effort to escape the rule, established by many cases, that ordinarily the defense of entrapment presents a jury question, contends that this is not a "standard entrapment" case. He argues that Hernandez, from whom defendant admittedly obtained possession of heroin, was an admitted government informer: that the conduct of the latter was "shocking or offensive per se," and that the government did not sustain its burden of rebutting defendant's testimony as to the circumstances under which he received possession of the heroin. This contention rests on the failure of the government to call the informer as a witness.

We think there is little, if any, merit in defendant's contention. Even so, we are disposed to make an abbreviated statement of the evidence, keeping in mind the general rule that it must be considered in a light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Weaver*, 360 F.2d 903 (CA-7), cert. den. 385 U.S. 825.

Federal narcotics agent Jordan testified that he watched as the informant, Hernandez, dialed defendant's telephone number and that he secured Hernandez's permission to listen in on the call. The agent recognized defendant's voice. Hernandez asked if it was defendant and was told it was. Hernandez said he had a buyer for heroin. Defendant said, "If the purchase goes down, I don't want to meet anybody. Just come alone." Hernandez said that would be fine. Defendant then said, "I have two ounces and the price would be twelve hundred dollars." Hernandez agreed to call defendant on Friday, June 16, 1967, at 10:30 a.m.

On Friday, agent Jordan again observed Hernandez dial defendant's number, and listened in on the phone conversation. Defendant answered, Hernandez said everything was ready and asked if defendant was ready. Defendant said he was, and reiterated that he had approximately two ounces and the price was twelve hundred dollars. Defendant instructed Hernandez to meet him at the twenty hundred block of North Halsted Street at about noon.

Agent Jordan was then joined by agent Kuksta, and they followed Hernandez to the appointed meeting place where they parked 100 feet from Hernandez' car. A short while later defendant and a girl crossed the street and got into Hernandez' car. After a short wait, the agents left their car and on reaching Hernandez' car saw defendant holding several aluminum foil packets, one of which he had open, and in this aluminum packet was a quantity of white powder. The agents then arrested defendant and the girl. After his arrest, defendant said he had only one thing to say and that was that the girl was not responsible for anything that happened.

Agent Kuksta corroborated agent Jordan as to what transpired at the time of defendant's arrest.

Defendant testified that he was acquainted with Hernandez and thought it possible that he was in the drug traffic but denied any drug transactions with him. He admitted that on June 16, 1967, he entered Hernandez' car and "gave him his package," a package which Hernandez had brought to defendant's house and left in his keeping two or three weeks before defendant's arrest. Defendant testified that Hernandez, at the time he gave defendant the package, stated, "Here, set on this for me." Defendant admitted to numerous telephone conversations with Hernandez as testified to by agent Jordan, but denied that either the word "heroin" or the words "twelve hundred dollars" were mentioned. Defendant testified that when he entered the car shortly before his arrest he stated, "Here, man," and threw the package on the seat. Hernandez opened the package, looked at it and made no reply when defendant asked him why he was looking at it.

Cheryl Sheain, who was in the car with defendant at the time of his arrest, testified that Hernandez asked defendant if he had the package and said he wanted to see it.

Defendant's contention that he was entitled to a directed verdict on the ground that the government failed to call the informer as a witness to rebut defendant's testimony is without merit. The testimony of agent Jordan as to the means employed by the informer to purchase the heroin, the agreement as to price and quantity, and defendant's insistence on secrecy, is wholly inconsistent with that of defendant that the heroin was left in his possession by the informer only for the purpose of later being reclaimed by him. Certainly this contradictory testimony was sufficient to present a jury question.

In *Masciale* v. *United States*, 356 U.S. 386, under a factual situation quite similar to that here and where the informer was not called as a witness, the court in deciding the issue adversely to the defendant stated (page 388):

> "As for [the informant], petitioner testified that the informer engaged in a campaign to persuade him to sell narcotics by using the lure of easy income. Petitioner argues that this undisputed testimony explained why he was willing to deal with [the agent] and so established entrapment as a matter of law. However, his testimony alone could not have this effect. While petitioner presented enough evidence for the jury to consider, they were entitled to disobey him in regard to [the informant] and so find for the Government on the issue of guilt. Therefore, the trial court properly submitted the case to the jury."

This court in *United States* v. *Caro*, 350 F.2d 862 (1965), followed Masciale in a case where the defendant, as here, testified that he had been approached by the informant to act as his messenger in giving a package to the undercover agent. Quoting the Masciale language excerpted above, we held that the defendant's testimony, unrebutted by the informant, did not establish entrapment as a matter of law but merely created a question of fact to be resolved by the trier of fact.

This court again considered the effect of a missing informant in *United States* v. *Simons*, 374 F.2d 993 (1966), cert. den. 386 U.S. 1025. There we stated (page 995):

> "We see no merit in this case in the contention that entrapment was established as a matter of law. The testimony favorable to the government shows that Simons readily entered into the transaction with the agent."

In *United States* v. *Pugliese*, 346 F.2d 861 (CA-2), the court in reviewing a narcotic conviction (the informer was deceased at the time of trial), citing *Masciale* stated (page 862):

> "We need not decide whether defendant's testimony, if true, warranted a directed verdict in his favor. The jury was entitled to disbelieve defendant's version of the facts and to rely only on the evidence presented by the government."

Defendant poses the question, "Can it seriously be contended that the act of a government agent in placing a narcotic in the hands of the defendant, and then procuring his prosecution for possessing it, is not offensive and shocking per se, despite the trial judge's belief to the contrary?" A number of Illinois cases are cited which purportedly require an answer favorable to defendant. It will be time enough to answer this question and consider cases relied upon by defendant when we are confronted with a pertinent factual situation. The fallacy of the contention, of course, resides in the fact that a response favorable to defendant would require the jury to accept his testimony and ignore that of the agents. This, as we have shown, the jury was not required to do.

The informer's identity was known to the defendant; in fact, they were longtime acquaintances. There is not even a suggestion that the government sought to conceal his identity or to prevent his presence at the trial. The record shows that the government made a reasonable effort to procure his attendance. The prosecutor talked to him the day before the trial and not only obtained his promise to be present but served a subpoena on him calling for his attendance.

No case is called to our attention and we know of none where it has been held under similar circumstances that the government's case must fail because it did not produce the informer as a witness. Whether the informer was produced or not, there was still the question from the testimony the jury heard whether it should credit the testimony of the defendant or that of the agents.

The judgment appealed from is

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.